United States Senate

COMMITTEE ON VETERANS' AFFAIRS

WASHINGTON, DC 20510

February 4, 2008

Director, Regulations Management (00REG)
Department of Veterans Affairs
810 Vermont Avenue, NW
Room 1068
Washington, DC 20420

Re: Response to RIN 2900–AM75—
"Schedule for Rating Disabilities;
Evaluation of Residuals of Traumatic Brain Injury (TBI)"

Dear Director:

We are writing to comment on the proposed rule for rating disabilities associated with traumatic brain injury (TBI). This proposal represents an improvement over the current regulation that limits compensation under certain circumstances to "10 percent and no more" unless there is a diagnosis of multi-infarct dementia. In particular, the explicit recognition that the classification of TBI at the time of initial injury may not reflect long term functioning is particularly helpful.

Proper evaluation and compensation for veterans with TBI, especially those veterans who are experiencing possibly unknown neurocognitive effects of blast injuries, is essential to fulfilling the Department's mission. Given that additional research may well result in the need for changes in whatever regulations are adopted, I urge that an ending date be included in any regulations adopted in order to ensure that VA reviews the criteria as medical research presents additional information.

A number of the proposed provisions raise serious concerns based upon the Committee on Veterans' Affairs' oversight of the adjudication of TBI claims during the past year, recommendations of the Institute of Medicine (IOM), and informal consultation with experts in the field of neurology and neuropsychology.

Proposed Rating for Symptom Complex

While the proposed rule involving symptoms acknowledges the breadth of the possible effects of TBI, the proposed rule for assessing the impact of the symptom complex associated with TBI fails to account for the severity and frequency of symptoms that result in loss of normal functioning and impact on employment. Thus, it appears the proposed regulation does not comply with the IOM's recommendation that "criteria for successively higher rating levels reflect increasing degrees of anatomic and functional loss of body structures and symptoms, (i.e., impairment), so that the greater the extent of loss, the greater the amount of compensation." A 21st Century System for Evaluating Veterans for

Disability Benefits, The National Academies Press Washington D.C. (2007) at 113.

Under the proposed rule, a veteran who experiences only one symptom, no matter how catastrophically disabling and how severely that symptom impacts employability, would not be compensated unless an extra-schedular evaluation was provided. For example, a veteran with TBI who suffers from severe vertigo on a daily basis (without a diagnosis of Meniere's syndrome), and may therefore be precluded from such activities as driving a motor vehicle, handling dangerous machinery or standing on ladders, would be rated at 0 percent. At the same time, under the proposed rule, a veteran who has monthly symptoms of mild headache, momentary transient dizziness, occasional fatigue and malaise, and decreased sense of taste and smell would appear to qualify for a rating of 30 percent. I/We therefore urge you to amend the proposed regulation to require that when there is a consideration of function loss, there be a requirement of assessment of both severity and frequency of symptoms and a recognition that direct injury to the brain may result in only one symptom.

Furthermore, a rating based on the bundling of symptoms, without satisfactory testing and professional assessment (including appropriate neuropsychological, neuroimaging and neuroncognitive testing), may not adequately portray the extent of disability experienced by a veteran.

In addition, the rationale for limitation of rating of the symptom complex to 40 percent is not stated and appears as arbitrary as the "10 percent and no more" criteria in the current regulations. If there is concern with regard to the accuracy of symptoms reported, additional neuropsychological or other testing may be used to assist in clarifying the extent of disability.

The regulations and preamble fail to provide any guidance on the use of appropriate neuropsychological testing and neuroimaging diagnostic testing, such as functional imaging techniques "which show promise for clarification of pathophysiology, symptom genesis and mechanisms of recovery." Textbook of Traumatic Brain Injury, American Psychiatric Publishing, Inc. (Washington D.C. 2005) at 293. In appropriate cases, such studies may help to clarify the degree of functional impairment imposed by the particular symptoms experienced by a veteran.

For disabilities that are less severe, some combination of disabling signs and symptoms may be useful in assessing the appropriate rating. However, any combined rating should take into account the frequency and severity of the functional impairments and not merely the number of signs or symptoms noted. A complete and thorough neuropsychological evaluation, with attention to functions needed for work activity, should inform the decision-making process.

Proposed Rating for Cognitive Impairment

The proposed rule in the table for evaluation of cognitive impairment does not appear to be based on any scientifically validated method of assessing severity of impairment. It may also have significant implementation problems. Rating specialists have estimated that use of the table would triple the amount of time needed to adjudicate the issue and therefore result in lost productivity. Many of the criteria in the table do not appear to accurately reflect the degree of functional impairment and vocational incapacity that should be expected from such loss. Consideration of the functional requirements for average employment capacity does not appear to have been taken into account in the table.

While the concept of a table for assessing functional impairment of the whole person may be useful, there are a number of problems with the table proposed by the regulation. In particular, several of the criteria that are assigned a score of 3 or 4, should be individually rated at 100 percent on the basis that the veteran is so disabled as to be unable to engage in average employment and therefore be rated at 100 percent without reference to other criteria. For example:

1. A veteran who is limited to working "in a sheltered workshop" or who is "unable to work or attend school" should be rated at 100 percent without regard to any other criteria. Appropriate evaluations should be used to determine the extent of functional loss that results in the limitations.

2. A veteran needing "assistance with the activities of daily living" due to a cognitive deficit should be rated at 100 percent and should also be considered under the separate classification for special monthly compensation under section 1114(m) of title 38, United States Code.

3. The level of impairment for supervision for safety should be modified. A veteran who "often requires supervision for safety" should be considered severely impaired, unemployable in average employment settings and therefore should be rated at 100 percent without regard to any other criteria.

4. The level of impairment for orientation for "sometimes disoriented to time or place" should be modified. A veteran who is sometimes disoriented to time or place would be unable to work in the average employment situation and should be rated at 100 percent without regard to other criteria.

5. The level of impairment for visual-spatial function should be modified. A veteran who may "get lost even in familiar surroundings" and has "occasional difficulty in recognizing faces" would be unable to work in average employment and should be rated at 100 percent without regard to other criteria.

6. The level of functioning for neurobehavioral effects lack criteria for frequency and severity. For example, a veteran who is physically or verbally aggressive on a daily basis would not be able to work in average employment and should be rated at 100 percent without regard to other symptoms or criteria.

7. The level of functioning for speech and language disorders should be modified. A veteran who is unable "to communicate either by spoken or written language, or both, more than occasionally or less than half the time" would not be able to work in average employment and should be rated at 100 percent without regard to other criteria.

Vague Terminology

The terminology used in the proposed rule to characterize some of the impairments appears to be vague, subjective, and likely to result in significantly disproportionate evaluations of similarly impaired veterans.

For example:

1. The level of impairment for memory, attention, and concentration uses the terms "moderate" and "severe" that could lead to significant variations in ratings without more specific criteria reflecting the impact on vocational functional ability for the moderate and severe categories.

2. The level of impairment for judgment uses the terms "mild", "moderate" and "severe" which could lead to significant variations in ratings without more specific criteria or examples. Criteria should take into consideration the judgment required for an average person to engage in employment related activities.

3. The level of impairment for appropriate response to social situations lacks any definition or examples of inappropriate responses (e. g. conflict with teachers or co-workers, fighting) that would aid an examiner or rater in providing consistent ratings. This could lead to significant variations in ratings.

4. The level of impairment for motor activity uses the terms "mild", "moderate" and "severe" which could lead to significant variations in ratings without more specific criteria or examples.

Prohibition on Separate Evaluations for Cognitive Impairment and for the Symptoms Cluster

The prohibition should be modified to include only those disabilities that are overlapping. The prohibition on pyramiding set forth in section 4.14, title 38, Code of Federal Regulations involves "evaluation of the same disability under various diagnoses." While some of the examples of cognitive impairment could

involve evaluation of the same disability under various diagnoses, using factors in the symptom complex, this is not true for all symptoms and all cognitive impairments. The prohibition should be modified to conform to the requirement that only those symptoms that would result in evaluation of the same disability under various diagnoses be prohibited.

Proposed Effective Date

The proposal that the new regulation applies to "all applications for benefits received by VA on or after the effective date of this rule," is too restrictive and appears to violate section 5110 of title 38, United States Code, with respect to claims that are pending on date of enactment. Furthermore, given the nature of the cognitive and emotional disabilities resulting from TBI, it is especially problematic that the burden for requesting review of a claim (including pending claims) adjudicated under the current regulation rests on the disabled veteran. TBI is a signature disability of the current conflicts in Iraq and Afghanistan. Claims filed on or after October 7, 2001 should be reviewed for readjudication under the revised regulation. At a minimum, veterans who are currently service-connected for TBI should be notified of the change in regulations and offered a simple form to utilize if they wish to request review.

In conclusion, we specifically make the following recommendations:

1. That section 4.124a at 8045 of title 38, Code of Federal Regulations, limiting compensation for TBI symptoms to "10 percent and no more," which has result in 10 percent ratings for severely disabled veterans, be immediately withdrawn.

2. That an interim regulation, similar to section 4.129 of title 38, Code of Federal Regulations, be promptly issued to provide that when the effects of a TBI are severe enough to bring about the release of a veteran from active military service, the rating agency shall assign an evaluation of not less than 50 percent and schedule an examination after six months following the veteran's discharge.

3. That the proposed regulation be revised to assure that veterans with TBI will receive thorough medical examinations by appropriate specialists and appropriate neuroimaging, neurocognitive and neuropsychological testing.

4. That the regulations be revised to reflect the average loss of earnings due to the functional limitations imposed by the effects of TBI on the individual veteran, with consideration of special monthly compensation and individual unemployability in appropriate cases.

5. That the regulations be reissued after proper consideration of relevant scientific and vocational factors supported by appropriate expert opinions.

6. That the Department establish an advisory committee to include experts in TBI diagnosis and treatment, as well as vocational experts who can provide a scientifically valid basis for the new regulation.

Thank you for your consideration of these comments. Action is urgently needed to provide fair and consistent evaluations of veterans who suffer from the debilitating effects of TBI.

Sincerely,

Daniel K. Akaka, Chairman

John D. Rockefeller IV

Patty Murray

Barack Obama

Jon Tester

Sherrod Brown

Bernard Sanders